IN THE HIGH COURT OF JUDICATURE AT BOMBAY

WRIT PETITION NO.1362 OF 1999

M/s.Pepsico India Holdings Ltd.,
a company registered under the
Companies Act, 1956 having its
Registered Office at Sunder Baug
Estate, Off.Sion Trombay Road,
Chembur, Mumbai-400 088. .. Petitioner

V/s.

1. Union of India
through the Secretary,
Ministry of Finance,
Department of Revenue, North Block,
New Delhi – 110 001.

2. Designated Authority/
Commissioner of Central Excise,
Mumbai-II, 9th Floor,
Piramal Chambers,
Jijibhoy Lane, Parel Lalbaug,
Mumbai.

3. Commissioner of Central Excise
(Appeals), 7th Floor, Annexe Bldg.
New Customs House,
Ballard Estate,
Mumbai-400 038. ..Respondents

Mr.V.Sridharan with Mr.Prakash Shah and Mr.Bharat Raichandan i/by M/s.P.D.S.Legal for the petitioners.

Mr.A.C.Singh i/by Mr.L.S.Shetty for the respondents.

CORAM : R.M. LODHA &
ANOOP V. MOHTA, JJ

DATED : 19TH JANUARY, 2006

ORAL JUDGMENT (Per R.M.Lodha, J.)

The present petition under Article 226 of the Constitution of India is directed against the order passed by the Commissioner of

Central Excise, Mumbai-II rejecting the declaration filed by the petitioners under Kar Vivad Samadhan Scheme, 1998 contained in the Finance (No.2) Act, 1998.

2. The controversy in the writ petition arises, in the facts and circumstances, that may be briefly noticed by us first.

3. The petitioners are engaged in the manufacture of aerated water, soft drinks, fruit-pulp based drinks. Their factory is situate at Off Sion Trombay Road, Chembur, Mumbai. The aerated water, soft drinks, fruit-pulp based drinks manufactured by the petitioners are liable to the Central Excise Duty. The Assistant Collector of Excise did not allow the deduction from the price towards certain post-manufacturing expenses to determine assessable value for the period from 1.10.1979 to 30.6.1983. The petitioners were issued with 20 show-cause notices and in the amount of Rs.98,37,567,51 was raised. The Assistant Commissioner of Central Excise took up the adjudication of the show-cause notices and passed an order in original No.24/96 on 31.5.1996 whereby he disallowed the abatement towards post manufacturing expenses and trade discount (Rebate on cash sales). Aggrieved by the said order, the petitioners preferred appeal before the Commissioner of Central Excise (Appeals), Mumbai. The Commissioner of Central Excise (Appeals), Mumbai rejected the appeal on 14.1.1999. The petitioners claim to have received the copy of the order in appeal dated 14.1.1999 on 23.2.1999.

4. Kar Vivad Samadhan Scheme, 1998 (the scheme) came into effect on 1st September, 1998 by the Finance (No.2) Act, 1998. Under

the scheme, the tax payer was required to file declaration for settling the tax arrears between 1st September, 1998 and 31st January, 1999. It is the petitioners' case that in order to put an end to the litigation and settle the tax arrears of Rs.31,62,625.34, they opted to avail the aforesaid scheme and made an application under section 88 of the Finance Act, 1998. The Commissioner of Central Excise, Mumbai-II as the designated authority rejected the petitioners' declaration on the ground that no appeal was pending before the appellate authority as on the date of the filing of the petition and, therefore, the petitioners were not eligible for the benefit of the scheme in view of the provisions contained in section 95(c) of the Finance Act, 1998. The petitioners' have averred that they made representation to the Central Board of Excise and Customs on 6th March, 1999 for directing the designated authority to accept the declaration filed by the petitioners as valid under the scheme. However, the Central Board of Excise and Customs did not respond to the petitioners representation and hence, they approached this court by means of the said petition.

5. Mr. V. Sridharan, the learned counsel for the petitioners took us through the various provisions of the scheme and submitted that the expression “pending” in section 95(c) of the Finance Act, 1998 must be given a workable meaning. He submitted that in so far as the petitioners were concerned, the appeal was pending before the appellate authority since on the date of the filing of the declaration, they had not received any communication of rejection of the appeal. The learned counsel would submit that the further appeal could have

been preferred by the petitioners only after receipt of the communication of the order and on the date the declaration was made by the petitioners, limitation for filing the appeal against the order dated 14.01.1999 had not even commenced much less expired. Mr.Sridharan submitted that the appeal is continuation of the proceedings; as a matter of fact, the petitioners preferred the appeal before the CEGAT and, therefore, the appeal must be treated as pending on the date, the declaration was made on 30th January, 1999 by the petitioners under section 88 of the Finance Act, 1998. In support of his submissions, the learned counsel relied upon the three judgments of the Supreme Court (i) Dr.Mrs.Renuka Datla and ors. v. Commission of Income-Tax and anr. 259 Income Tax Reports, 258, (ii) Commissioner of Income Tax, Rajkot v. Shatrusailya Digvijaysingh Jadeja (2005)& SCC 294 and (iii) D.Saibaba v. Bar Council of India and ors. (2003)6 SCC 186.

6. The question that falls for consideration before us is: was the Commissioner of Central Excise, Mumbai-II (designated authority) justified in rejecting the declaration filed by the petitioners on 30.1.1999 under the Kar Vivad Samadhan Scheme, 1998.

7. Section 95 of the Finance Act, 1998 provides that the provisions of the scheme shall not apply in certain cases. Section 95 reads thus-

> **"95. Scheme not to apply in certain cases.** - The provisions of this Scheme shall not apply-
>
> (i) in respect of tax arrear under any direct tax enactment,-
>
> (a) in a case where prosecution for concealment has been instituted on or before the date of filing of the

declaration under section 88 under any direct tax enactment in respect of any assessment year, to any tax arrear in respect of such assessment year under such direct tax enactment or in respect of a person who has been convicted for concealment on or before the date of filing the declaration.

(b) in a case where an order has been passed by the Settlement Commission under sub-section (4) of section 245D of the Income-tax Act or sub-section (4) of section 22D of the Wealth-tax Act, as the case may be, for any assessment year, to any tax arrear in respect of such assessment year under such direct tax enactment;

© to a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court on the date of filing of declaration or no application for revision is pending before the Commissioner on the date of filing declaration;

(ii) in respect of tax arrear under any indirect tax enactment,-

(a) in a case where prosecution for any offence punishable under any provisions of any indirect tax enactment has been instituted on or before the date of filing of the declaration under section 88, in respect of any tax arrear in respect of such case under such indirect tax enactment;

(b) in a case where show cause notice or a notice of demand under any indirect tax enactment has not been issued;

© in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no application for revision is pending before the Central Government on the date of declaration made under section 88.

(iii) to any person in respect of whom prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code (45 of 1860), the Foreign Exchange Regulation Act, 1973 (46 of 1973), the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Terrorists and Disruptive Activities (Prevention) Act, 1987 (26 of 1987), the Prevention of Corruption Act, 1988

(49 of 1988), or for the purpose of enforcement of any civil liability has been instituted on or before the filing of the declaration or such person has been convicted of any such offence punishable under any such enactment;

(iv) to any person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (52 of 1974):

Provided that-

(a) such order of detention, being an order to which the provisions of section 9 or section 12A of the said Act do not apply, has not been revoked on the report of the Advisory Board under section 8 of the said Act or before the receipt of the report of the Advisory Board; or

(b) such order of detention, being an order to which the provisions of section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under sub-section (3) of section 9, or on the report of the Advisory Board under section 8, read with sub-section (2) of section 9 of the said Act; or

(c) such order of detention, being an order to which the provisions of section 12A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under sub-section (3) of that section, or on the basis of the report of the Advisory Board under section 8, read with sub-section (6) of section 12A, of the said Act; or

(d) such order of detention has not been set aside by a court of competent jurisdiction;

(v) to any person notified under sub-section (2) of section 3 of the Special Court (Trial of Offences Relating to Transaction in Securities) Act, 1992 (27 of 1992).”

8. In the present case, we are concerned with section 95(ii)(c). Section 95(ii)(c) is in identical terms with section 95(i)(c); the only difference being that section 95(i)(c) is in respect of tax arrear

under any direct taxes enactment while section 95(ii)(c) is in respect of the tax arrear under indirect tax enactment.

9. In the case of Shatrusailya Digvijaysingh Jadeja (supra), the Supreme Court held that the scheme was in substance a recovery scheme though it was nomenclatured as a litigation settlement scheme. Dealing with the object of the scheme, the Supreme Court observed thus-

> "11. The object of the Scheme was to make an offer by the Government to settle tax arrears locked in litigation at a substantial discount. It provided that any tax arrears could be settled by declaring them and paying the prescribed amount of tax arrears, and it offered benefits and immunities from penalty and prosecution. In several matters, the Government found that a large number of cases were pending at the recovery stage and, therefore, the Government came out with the said Scheme under which it was able to unlock the frozen assets and recover the tax arrears."

10. Section 95 which provides that the scheme shall not apply in certain cases has to be construed strictly. It has double negative. There is no question of any equitable consideration. In the present case, we are concerned with the meaning of the word "pending" in section 95(ii)(c). According to section 95(ii)(c), the scheme shall not apply in respect of the tax arrear under indirect tax enactment in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or Supreme Court or no application or revision is pending before the Central Government on the date of declaration made under section 88. On the date of the filing of the declaration, if no litigation has been pending, the arrear of tax cannot be said to be under dispute and

obviously, the scheme shall not be applicable.

11. The word “pending” has been used in section 95(ii)(c), as a matter of moment and the deemed pendency of the appeal cannot be read into it. For being eligible for the benefits of this scheme, interalia, the Act contemplates the actual pendency of appeal at the time of filing declaration under section 88 and not fictional. The term `pending' means something undecided; not terminated. A proceeding is `pending' as soon as commenced and until it is concluded, i.e., so long as the forum having taken cognizance of the proceeding makes an order on the matters in issue. The proceeding shall be ceased to be pending once it is decided.

12. On the date the scheme came into force with effect from 1st September, 1998, the appeal filed by the petitioners against the order in original dated 31.5.1996 was admittedly pending before the Commissioner of Central Excise (Appeals). Under section 88 of the Finance Act, 1988, the declaration could have been made upto 31st January, 199. The appeal preferred by the petitioners was heard on 10.12.1998 and the order in appeal came to be issued on 14.1.1999. The appeal having already been disposed of on 14.1.1999 by the Commissioner of Excise (Appeals), we find it difficult to hold that the said appeal was pending in so far as the petitioners was concerned until the receipt of the order in appeal on 23.2.1999. By no stretch of imagination, the appeal that came to be disposed of by the Commissioner of Central Excise (Appeals) and the order in appeal having been issued on 14.1.1999 can be held to be pending until the receipt of the copy of the order in appeal by the petitioners. The

factum of receipt of the copy of the order in appeal and that limitation for filing an appeal against the order in appeal had not expired are irrelevant for construing the word `pending' in section 95(ii)(c).

13. In the case of Shatrusailya Digvijaysingh Jadeja, the revisions filed by the assessee were time barred and, therefore, according to the department, they were not pending in terms of section 95(i)(c). Dealing with this aspect, the Supreme Court in paragraphs 12,13,14 and 15 of the report held thus-

> "12. In our view, the Scheme was in substance a recovery scheme though it was nomenclatured as a "litigation settlement scheme" and was not similar to the earlier Voluntary Disclosure Scheme. As stated above, the said Scheme was a complete code by itself. Its object was to put an end to all pending matters in the form of appeals, references, revisions and writ petitions under the IT Act/WT Act. Keeping in mind the above object, we have to examine Section 95(i)(c) of the Scheme, which was different from appeals under Section 246, revisions under Section 264, appeals under Section 260-A, etc. of the IT Act and similar provisions under the WT Act. Under the IT Act, there is a difference between appeals, revisions and references. However, those differences were obliterated and appeals, revisions and references were put on par under Section 95(i)(c) of the Scheme. The object behind Section 95(i)(c) in putting on par appears, references and revisions was to put an end to litigation in various forms and at various stages under the IT Act/WealtyTax Act and, therefore, the rulings on the scope of appeals and revisions under the IT Act or on Voluntary Disclosure Scheme, will not apply to this case.
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> 13. One more aspect needs to be looked into. The Finance (2) Act, 1998 introduced a scheme called the Kar Vivad Samadhan Scheme, 1998. It was a recovery scheme. Under the Scheme, the tax arrears had to be outstanding as on 31.3.1998. Under Section 87(f), "disputed tax" was defined to mean total tax determined and payable under the IT Act/Wealth Tax Act in respect of an assessment year but which remained unpaid as on the date of making of the declaration from which TDS, self-assessed tax, advance tax paid, if any, had to be deducted

> under Section 90; the DA had to determine the amount payable and for that purpose, he had to determine the tax arrear as well as the disputed amount as defined under Section 87(f). Thus, the DA had to make an assessment of tax arrears, disputed amount and amount payable for each year of assessment; that the appeal was barred against the order under Section 90 (see Section 92); that such determination had to be done within 60 days from the receipt of the declaration and based thereon the DA had to issue a certificate. In other words, till the completion of the aforestated exercise, the appellant could not have paid the amount of tax and, therefore, the appellant was not liable to pay interest as his liability accrued only after the ascertainment of the amount payable under Section 90. In the present matter, that exercise has been completed; that taxes have been recovered by the sale of lands; that amounts have been paid pursuant to the determination by the DA, may be under the orders of the High Court and, therefore, we do not wish to reopen the matter.
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> 14. In the case of Dr.Renuka Datla this court has held on interpretation of Section 95(i)(c) that if the appeal or revision is pending on the date of the filing of the declaration under Section 88 of the Scheme, it is not for the DA to hold that the appeal/revision was “sham”, ineffective” or “infructuous” as it has.
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> 15. In the case of Raja Kulkarni v. State of Bombay this Court laid down that when a section contemplates pendency of an appeal, what is required for its application is that an appeal should be pending and in such a case there is no need to introduce the qualification that it should be valid or competent. Whether an appeal is valid or competent is a question entirely for the appellate court before whom the appeal is filed to decide and this determination is possible only after the appeal is heard but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent e.g. When it is held to be barred by limitation. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court.”

14. There is a difference between the case in hand and the case that was before the Supreme Court in Shatrusailya Digvijaysingh Jadeja. In the present case, the order in appeal came to be issued

much before the declaration under section 88 of the Finance Act, 1998 was filed and no further appeal had been preferred until that time whereas in the matter of Shatrusailya Digvijaysingh Jadeja before the Supreme Court, the revisions had been filed but those were time barred. The Supreme Court in the fact situation held that the designated authority erred in rejecting the declaration filed by the assessee. It was observed that what was important is not the maintainability of the appeal but the pendency of the appeal.

15. In the case of Dr.(Mrs.) Renuka Datla, the Supreme Court held that the use of the double negative in section 95 means that the benefit of the scheme will be available only when an appeal, reference etc. are pending in respect of the tax arrears. However, the issue before the Supreme Court in Dr.(Mrs.) Renuka Datla was whether the declaration made by the assessee was rightly rejected because there were no tax arrears and the demand had been considered and the interest had been directed to be waived by DGIT. Dealing with this aspect, the Supreme Court held thus-

> "In our opinion, both the Commissioner of Income-tax (Appeals) as well as the High Court have proceeded upon an interpretation of the phrase "tax arrears" de hors the definition under section 87(m) as quoted above. In this case, there was a determination of the amount taxed by the original assessment order on March 31, 1995, i.e., before March 31, 1998. The determination was modified by the orders dated November 17, 1997, and December 31, 1998, pursuant to the Commissioner of Income-tax (Appeals)'s order. The determination on December 31, 1998, was not a fresh assessment for the purposes of the scheme but the modification of the original "determination" by the assessment order dated March 29, 1996. It is not in dispute that the modified demand was not paid by the appellant on the date when the declaration was filed. Whether the modified demand is as a result of concession or otherwise is not a relevant consideration for the

> purposes of section 87(m). The section itself makes no such distinction between a conceded demand and any other for the purposes of the Scheme. Section 87(f) appears to fortify the position by the definition of "disputed tax" as "the total tax determined and payable in respect of an assessment year under any direct tax enactment but which remains unpaid as on the date of making the declaration under section 88". The word "determined" is not qualified by the process by which the determination is made.
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> However, not all "tax arrears' under section 87(m) are entitled to the benefit of the Scheme. If no appeal, etc., is pending in respect of the tax arrears, the benefit of the Scheme is not available under section 95(i)(c). If an appeal, etc., is pending, it is not for the designated authority to question the possible outcome of the appeals, nor for the High Court to hold that the appeal was "sham", "ineffective" or "infructuous" as it has. In any event, the High Court erred in holding that the entire demand raised on December 31, 1998, had been consented to by the appellant. In computing the demand on December 31, 1998, the Assessing Officer included not only those items which had been remitted by the Commissioner of Income-tax (Appeals) for re-determination, and which were conceded by the appellant, but also the items which had been confirmed by the Commissioner of Income-tax (Appeals) which had not been conceded and were the subject matter of appeal before the Tribunal. Thus the question of imposition of interest under sections 234A, 234B and 234C and the determination in respect of items (iii) and (vii) referred to above, even according to the High Court's view, was the subject matter of appeal. In the facts of the case therefore, it cannot be said that there was no appeal pending in respect of the tax arrears pertaining to those items within the meaning of section 95(i)(c).
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> Since the appellant's case formally fulfilled the criteria for being considered under Chapter IV of the Act, we set aside the order of the High Court."

16. The present case is entirely different. On the date the declaration was filed by the petitioner, the appeal had already been disposed of. The judgment of the Supreme Court in the case of Dr. (Mrs.) Renuka Datla is not applicable to the facts of the present

case. In so far as judgment of the Supreme Court in the case of D.Saibaba is concerned, the issue related to the construction of the expression “Sixty days from the date of that order”, in section 48-AA of the Advocates Act, 1961 for filing review petition and while interpreting the said construction, the Supreme Court observed that where literal construction of plain meaning may cause hardship, futility, absurdity or uncertainty, the court may prefer purposive or contextual construction to arrive at a more just, reasonable and sensible result. Section 95 uses double negative and, therefore, has to be given plain meaning and the benefit of the scheme shall only be available when an appeal etc., is pending in respect of tax arrear. There is no room for equity or any other construction on the ground of hardship.

17. In our view, the rejection of the declaration filed by the petitioners under section 88 of the Finance Act, 1998 cannot be said to suffer from any legal error.

18. We, accordingly, dismiss the writ petition with no order as to costs.

(R.M. LODHA, J.)

(ANOOP V. MOHTA, J.)